# The Fourteenth Edition of the Code of Practice A PhonepayPlus Consultation

**STATEMENT FOLLOWING CONSULTATION**

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**Consultation closed on 1 February 2016**

## Contents

## Executive Summary

The 13th edition of the PhonepayPlus Code of Practice was approved by Ofcom and came into force on 1 July 2015. Before that, in April 2015 it was formally announced at the PhonepayPlus forum that we would separately be reviewing Part 4 of the Code, and specifically the investigations, adjudications and appeals procedures contained within it. This review also looked at PhonepayPlus' "Investigations and Sanctions Procedure" (I&SP), which whilst not part of the Code serves to support the enforcement process.

The review made recommendations in respect of four core areas:

- Independence
- Transparency and certainty
- Fairness
- Proportionality and consistency

These recommendations formed the basis for development of a draft 14th edition of the Code, which proposed a much more streamlined and less complex process than currently exists around investigations and adjudications. The key changes can be summarised as follows:

  - Bringing forward the consideration of interim measures – i.e. withholds and/or suspensions – to an earlier stage in all Track 2 investigations. This in turn removed the need for the current Emergency procedure, which we proposed to abolish.
  - Replacement of the current Code Compliance Panel (CCP) with a new body, the Code Adjudication Panel (CAP) which would no longer contain members of the PhonepayPlus Board. This provided a separation between those who make the Code – the Board – and those who enforce it.
  - An internal mechanism to review the recommendations of the Investigations team before breaches and sanctions are outlined to the provider in a "Warning Notice".
  - Enhanced potential for providers to settle cases once they have received the Warning Notice, and prior to a hearing.
  - A more flexible hearing, allowing for different levels of oral and legal representation.
  - A more streamlined, simplified process which removed post adjudication reviews and the Independent Appeals Body (IAB) stage.

PhonepayPlus consulted on this proposed 14th edition of the Code between 23rd November 2015 and 1st February 2016. In changing the Code, we also altered the supporting procedures, and whilst we did not formally consult on changes to supporting procedures these were published in January 2016 for stakeholder comment, and to provide some helpful context to the Code proposals for respondents.

Responses to the consultation were generally supportive of our approach and proposals, and the majority of concerns focused on the details or implementation of the key changes rather than the principle of the changes themselves. Section Two of this Statement sets out a consideration of each of these and any proposed changes, either to the Code or to supporting procedures, in light of them.

The exception to the above was in respect of the lack of any post-adjudication appeal within the proposal. In proposing to remove all post-adjudication appeals from the PhonepayPlus

Code, we had reasoned that the post-adjudication review process was currently over-complex, and was often perceived as including steps that were redundant by those progressing through it. Furthermore the recognised benefits of appeals as expressed by PRS providers who had relied upon them previously - greater robustness, the opportunity for oral representation - were all built into the proposals on which we had consulted.

However feedback from a number of respondents representing a significant proportion of the PRS industry highlights that however robust the new process becomes there is still scope for Tribunals to have erred in fact or in law. Several respondents expressed the view that most PRS providers are of a small size, and the cost of a judicial review could be expensive enough to dissuade them from seeking a remedy in respect of that mistake. From such responses, we understand that industry members see significant benefits and greater fairness in retaining the possibility of some form of review following a Tribunal's decision.

We agree that there needs to be a mechanism for dealing with errors of fact or law, even though we consider that they should be rare, and even more so in view of the improvements in our processes contained in the new Code. As such we have reviewed our original proposal in respect of post-adjudication reviews, and determined that the best way to provide for this possibility is to add a single, limited review to the proposed procedure described in the consultation document. This is set out in more detail within Section Two of the document, but in summary the post-adjudication review will work as follows:

- The relevant party will have the opportunity to apply for a review of decisions on limited grounds, related to material errors of fact or law, failure to follow decision-making procedures or *Wednesbury* unreasonableness (irrationality)[1]
- The decision to grant a review will be made by the Chair of the Code Adjudication Panel (or another legally qualified member of the CAP if the Chair was involved in the original decision or is unavailable) on the application of either the provider or PhonepayPlus
- The review (where granted) will be heard by three different members of the CAP to those who were involved in the original Tribunal decision. They will have the power to confirm, vary or rescind any adjudications (in whole or part) made by the original Tribunal.

[1] See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223.* This case set the test for the judicial review ground of unreasonableness as being that "the reasoning or decision is so unreasonable that no reasonable authority could ever have come to it".

## Section One - Background

1.1 PhonepayPlus consulted on the 13th edition of our Code of Practice in 2014. Whilst respondents were supportive of the majority of proposed changes, there were some significant concerns about proposals which were intended to clarify the investigation, adjudication and appeals procedures contained within Part 4 of the Code. Some respondents supplied feedback that went beyond just the proposed changes, and also commented on whether some of the underlying framework could be improved going forward. The PhonepayPlus Board had also decided that our processes and procedures set out in Part 4 of the Code needed to be improved.

1.2 In addition, between the Code consultation closing and PhonepayPlus concluding its analysis of responses, the High Court delivered its judgment in relation to the judicial review (JR) case brought by Ordanduu and Optimus Mobile against PhonepayPlus. This was in response to PhonepayPlus' initiation of its Emergency Procedure against Ordanduu and Optimus Mobile in 2013. During the permission stage of the JR, the court commented on the perceived complexity of our appeals procedures. The substantive judgment found a number of flaws with the way in which the Emergency Procedure had been applied in those cases.

1.3 Taking all of these factors into account, our Statement following consultation of the 13th Code announced that we would not take forward our originally proposed changes to the 13th edition of the Code around "Track 2" investigations procedures, Reviews, Oral Hearings, and the Independent Appeals Body. Instead, PhonepayPlus announced it would undertake a separate review of the investigations, adjudications and appeals procedures set out at Part 4 of the 13th edition of the Code.

**"Part 4" Review**

1.4 The Terms of Reference of the "Part 4 Review" were published by PhonepayPlus in May 2015. They set out that the focus of the review, which would then form the basis for consultation on a fourteenth edition of the Code of Practice with new Part 4 provisions, would be on the four following areas:

- Independence
- Transparency and certainty
- Fairness
- Proportionality and consistency

1.5 Whilst not a core area, the review also had the goal of improving the efficiency and cost effectiveness of the process.

1.6 With the review complete, we published a version of the proposed 14th edition of the Code for consultation in November 2015. This revised the previous investigations, adjudications and appeals processes set out in Part 4 of the 13th Code, and included a small number of consequential changes in Annexes to the Code.

1.7 Because the 13th edition of the Code had only been launched in July 2015, the consultation document for the draft 14th edition set out that we were satisfied there had been no material change in circumstances which would bring the remainder of Code provisions into question. As such we had neither reviewed nor proposed changes to other parts of the Code. We did not receive any responses to the consultation suggesting changes to other parts of the Code.

1.8 In addition the review made separate recommendations around Executive capability, quality assurance, and other procedures which support the smooth flow of investigations and adjudications procedures, but which were not included in the new draft Code. These did not form part of the consultation, but will support the Code and more broadly ensure PhonepayPlus is able to make decisions which are sound, fair and lawful.

1.9 As a result PhonepayPlus also produced a separate document setting out supporting procedures for the Code, in line with the review's recommendations. Whilst we did not formally consult on the supporting procedures, a draft version of these was published in January 2016 for stakeholder comment, and to provide helpful context for those responding to the Code consultation.

**Code Review Process**

1.10 Having embarked upon the Part 4 Review in April 2015, PhonepayPlus conducted a number of meetings and workshops with key stakeholders during June and July, in order to test our initial thinking in relation to proposals to revise Part 4 of the Code and corresponding supporting procedures. The response from stakeholders to our direction of travel was generally positive, but these meetings and workshops provided useful feedback in developing the proposals further.

1.11 PhonepayPlus began a public consultation of its final proposals on 23rd November 2015. On 16th December we held an open stakeholder seminar, to provide an opportunity to explain and discuss the proposals for the Code and to introduce the supporting procedures, and how the Code and supporting procedures are intended to interact with each other. The response at this event was broadly positive, with some stakeholders asking questions about whether a post-adjudication review was necessary, and others asking questions which were more focused on the detail of how individual changes would work. This was useful feedback ahead of formal consultation responses.

1.12 The consultation closed on 1st February 2016. Following consideration of responses we are now issuing this final Statement, which sets out revisions which we have made to the 14th edition of the Code in light of comments received. Shortly after this Statement is published, Ofcom will publish a consultation on approval of the 14th edition of the Code, and at the same time will notify the European Commission of its provisional decision to approve the draft Code. This will begin a statutory three month standstill period under the EU Technical Standards Directive[2]. Subject to there being no comment - either from respondents to Ofcom's consultation, the European Commission, or other EU member states - which may necessitate further review and changes to the Code we plan to publish the finalised 14th edition of the Code in July 2016.

1.13 A significant number of the comments we received in response to the Code consultation related to how some of the changes to the Code would be implemented in practice. As a result we have made changes to the draft supporting procedures as well as to

[2] See Directive 2015/1535/EU.

the draft Code.  Both sets of changes are set out in more detail at Section Two of this document.

## Section Two – Consideration of Responses and Determination

2.1 PhonepayPlus undertook a public consultation on the draft Code of Practice running from 23rd November 2015 to 1st February 2016 seeking input from a wide range of stakeholders, including consumer bodies and industry in addition to the general public. Our proposals also benefitted from insights gained from discussions of the proposals with the CCP and IAB. We received 7 responses to the consultation, which were all from industry stakeholders. Two responses came from trade associations. The UK Competitive Telecommunications Association (UKCTA) – an association of voice-based networks – and the Association of Interactive Media and Entertainment (AIME) – an association with a range of members including both voice and mobile networks, payment aggregators, and merchants. The remaining responses were from the payment aggregators Buongiorno[3] and IMI Mobile, the merchant BMCM, the mobile network operator Vodafone and the broadcaster ITV.

2.3 Responses were generally positive. All respondents agreed with the aims behind the Part 4 Review of making the investigation and adjudication procedures more independent, transparent, fair, proportionate and consistent. Whilst some respondents had comments or questions as to how the proposed new procedures might be refined, or the details of how they would work in practice, all respondents signalled they were content with the principal proposals. The one fundamental concern was around the lack of a post-adjudication review or appeal, which is addressed below and where PhonepayPlus has been persuaded to change the model consulted upon in order to allow for a limited right of review.

2.4 In addition to answering the ten questions which the consultation asked, AIME also supplied a list of 30 specific comments on individual Code provisions – all related to Part 4 of the Code or consequential paragraphs at Annex 3. We have addressed each of these, and set out any changes we will make as a result, in a table which is set out at Annex A. We have also made a number of clarificatory and presentational changes within Part 4 and one at paragraph 3.10.3(a) of the 14th Code. The final version of the 14th Code, which Ofcom will shortly consult and submit to the European Commission, is attached at Annex B with all changes made to the proposed 14th Code, upon which we consulted, tracked for ease of reference.

### General Comments

2.5 IMI Mobile commented that the consultation document had suggested in some paragraphs that a breach of the Code could be determined by the Executive, before either a provider had agreed the alleged breaches set out in a Warning Notice, or a Code Adjudication Tribunal had upheld the breaches. We can confirm that this was not our intention, and that breaches raised through the Executive remain allegations until they are either accepted by the relevant provider or upheld by a Tribunal.

2.6 UKCTA and Vodafone both asked if PhonepayPlus would set out a process by which all parties in a PRS value chain will be kept informed during the stages of an investigation. This arose from a concern that networks, and those classed as Level 1 providers for the purpose of investigations, might be unable to fulfil what the Code expects of them around Due Diligence Risk Assessment and Control in relation to their clients without timely information as to the levels of alleged harm, seriousness of alleged breaches, and any interim measures PhonepayPlus is considering.

[3] Since their response to this consultation, Buongiorno has rebranded as Docomo Digital. However for the purposes of this statement we will refer to them by the name in which they made their response.

2.7 The current situation (which we propose to maintain under the proposed 14th Code) is that all other relevant parties in a PRS value chain will be made aware of suspensions or withholds when a network acts in some way to implement the directions issued by PhonepayPlus. This is on the basis that the other PRS providers may also be required to take specific action as a consequence of a suspension or withhold direction in relation to a service. However, if a Level 1 provider decided to carry out a voluntary suspension or withhold of its own choosing, it is possible that those higher up the value chain would be unaware. It is our understanding that this is the reason for UKCTA and Vodafone's concern.

2.8 In response we can confirm that we would look to provide information to other relevant parties in a PRS value chain as soon as is reasonably practicable. This would realistically be at the same time, or soon after, the relevant party under investigation is informed but not before. In considering this position, we have particularly considered that at early stages of an investigation, it is possible that the Investigations Team will later downgrade or abandon the investigation in light of there being no, or insufficient, evidence to support a Track 2 investigation.

2.9 As such we will look to alter the supporting procedures to make it clear we will provide information to other relevant parties in the same PRS value chain, who are not themselves part of the same investigation, as soon as is reasonably practicable during any stage of an investigation. We will also look to provide appropriate context with such information, such as reminding others that we have not yet determined any breaches if an investigation is at an early stage.

**Allocation Criteria**

2.10 The consultation set out that whilst consistent criteria are used to support the decisions to allocate cases to either a Track 1 or a Track 2 investigation under the 13th Code, these criteria are not documented. So in order to provide more transparency and certainty to providers under investigation, we proposed that high level criteria were provided within the Code, and further expanded upon in the supporting procedures document.

2.11 The relevant part of the Code was proposed to read as follows:

*4.3.2*

*a) In determining the allocation of a case, PhonepayPlus will take into account all relevant considerations as shall be set out in Procedures published by PhonepayPlus from time to time.;*

*b) Such considerations shall include, but not be limited to: the seriousness of the apparent breach, potential severity of the consumer harm and the breach history of the party or parties concerned.*

2.12 The consultation went on to propose that if there was sufficient evidence to suspect breach(es) of the Code, members of the PhonepayPlus Executive would decide which Track to allocate a case to. When making this decision, they would consider a number of factors which were detailed in the consultation. The question we asked respondents was as follows:

**Q1 – Do you agree with the proposal to set out allocation criteria at a high level within the Code?**

2.13 No respondent disagreed with this proposal, and a number were directly supportive of it. In addition, no respondents challenged the criteria on which we proposed to make

allocation decisions, as set out in supporting procedures. However, IMI Mobile asked if we could clarify whether we intend to make individual assessments against Allocation criteria available in writing to relevant providers during investigations. We can clarify that this is our intention, and we will clarify this, and the level of detail which will be provided, within supporting procedures.

2.14 In addition, Vodafone asked if we would communicate the grounds on which complaints are allocated to a Track 1 or Track 2 to the other parties in the relevant PRS value chain. It was their view that this would help industry members to understand the implications of compliance and act accordingly. As with any notification to other parties during an investigation, we can confirm that we would look to communicate any information relevant to ongoing Due Diligence, Risk Assessment and Control considerations when it was reasonably practicable to do so during an investigation. As before, this will be clarified within supporting procedures.

2.15 AIME responded that they agreed with the proposal on the understanding that the primary criteria is to resolve cases using informal or Track 1 procedures as a priority, and Track 2 only in exceptional circumstances. They also commented that they considered the allocation criteria to be highly subjective, and in their view this would require senior management oversight to ensure allocation was correct. They recommended we build a "graded measures" test into internal procedures and indicate whether we had applied this in every case under the 14th Code.

2.16 We agree that we would look to resolve cases using informal or Track 1 routes wherever it is appropriate to do so but we do not consider that Track 2 should be used only in "exceptional circumstances". "Exceptional circumstances" seems to us to go beyond a decision that a Track 2 investigation will be opened where the circumstances of the case warrant allocation to the Track 2 procedure, as determined against our published allocation criteria.

2.17 Allocation criteria will, for the first time, be set out at a high level within the Code, and in more detail within supporting procedures. This will provide considerably more transparency to providers as to the factors we will apply when deciding which Track to allocate a case. Senior management oversight will be provided by an internal panel prior to the consideration of any interim measures and/or the issuance of any Warning Notice, and this oversight will include consideration of whether or not the case has been correctly allocated.

**Interim Measures**

2.18 The consultation then went on to address the imposition of interim measures – i.e. service suspensions and/or withholds – during a Track 2 investigation. This was with a view to making these considerations simpler, more transparent, and with a greater degree of independence. The key proposed changes, set out at Sections 4.5 and 4.6 of the proposed new Code, were as follows:

- Building an automatic consideration of whether a suspension is necessary into each Track 2 investigation, rather than a suspension being an automatic part of an Emergency procedure.
- Consequent to the above, the removal of a separate Emergency procedure
- Codification of the general criteria for a service suspension (at para 4.5.1a), with more detailed criteria set out in the supporting procedures.

- Earlier consideration of withholds than at present, taking place after Allocation and with the relevant provider being presented with the basis for the withhold recommendation, rather than at the Breach Letter stage as at present.
- Decisions around withholds to be subject to the same level of robustness as for decisions around suspensions. All withholds and suspensions would be considered first by an internal panel drawn from senior PhonepayPlus Executives and Board Members, and then decided by a Code Adjudication Tribunal (CAT), with the relevant provider normally being notified before the imposition of the measure and having the right to submit representations for CAT consideration, and then subsequently a right to seek a review (where it falls within one of the circumstances set out in paragraph 4.6.6 of the Code).

2.19 In addition, the consultation set out that PhonepayPlus proposed to retain a capability to carry out a suspension or withhold "without notice" – i.e. without contacting a provider first and inviting them to submit their counter-argument for consideration by a CAT. There may be important public interest reasons for an immediate without notice action where, for instance, there is a real and significant risk that, if given prior notice of the action, a provider would transfer monies beyond reach of the regulator, or otherwise go to ground were they to receive an imminent, sizeable out-payment in respect of a service under investigation.

2.20 In cases where such a "without notice" suspension or withhold took place, paragraph 4.6.4 of the proposed new Code would have required the Investigations team to use best endeavours to present all material facts to the internal panel and subsequently the CAT. This includes anything which the relevant provider might reasonably have relied upon. In addition the Investigations team would have been required to use best endeavours[4] to attempt to inform the provider of the suspension and/or withhold as soon as possible after it has been approved. The provider would then be entitled to appeal the decision, as set out at paragraph 4.6.6 of the proposed new Code.

**Q2 – Do you agree with our proposal to consider interim measures automatically, and at an earlier stage, in all Track 2 cases?**

**Q3 – Consequent to Q2, do you agree with our proposal to remove the Emergency procedure from the Code?**

**Q4 – Do you agree with our proposal to introduce a P-CAT review of its decision to withhold revenue or suspend a service if the provider requests it?**

2.21 Once again, no respondents fundamentally disagreed with any of these proposals. A number of respondents, representing a significant group of industry stakeholders, recognised them as an improvement on the current arrangements. The decision to remove a separate Emergency procedure was welcomed as being more important than it might seem, on the grounds that the public notification of an Emergency procedure can have a damaging effect on a provider's reputation and ability to attract future investment.

2.22 During the consultation period, we identified that the means by which the proposed 14th Code sought to introduce interim measures had shifted focus from the severity of apparent breach being investigated to simply a consideration of the harm that may have been caused by the apparent breach. The former enabled us to take urgent action to remedy an apparent serious breach of the Code (as demonstrated by for example our monitoring) whether or not it was causing actual harm or revealed a significant risk of harm to consumers. Following further consideration, PhonepayPlus has amended paragraph 4.5.1(a)

[4] The wording "best endeavours" has been altered in the final version of the 14th Code to read "reasonable endeavours". Please see paragraph 2.29 of the Statement for more detail.

of the Code to include instances where "the apparent breach is causing serious harm *or presents a serious risk of harm* to consumers". We believe this change is necessary to ensure that the effectiveness of interim measures is maintained by retaining our ability to consider the proactive use of such measures in relation to a serious risk of consumer harm rather than solely retrospective use following the occurrence of serious harm.

Suspensions and Withholds

2.23 Respondents raised a number of specific points in relation to these proposals. AIME noted that the consultation stated an intent to allow for alternatives to a withhold, such as the posting of a bond by the provider. However they also suggested that this was not made clear, either in the Code or in the supporting procedures. Whilst the supporting procedures do already contain a procedure for posting of a bond by a provider, we have made an amendment to the Code at paragraph 4.6.2 to clarify the ability for alternative interim security to be considered and accepted. We will make a consequential amendment to the draft supporting procedures..

2.24 BMCM asked if PhonepayPlus would set out criteria as to when a withhold can be released back to a provider In practice such criteria would be limited to the posting of a bond (or other alternative arrangement) or the downgrading of a case from Track 2 to Track 1. Other than that withholds would be kept in place until after an agreement at Warning Notice stage or a CAT decision, unless a CAT review under paragraph 4.6.6 of the Code deems it to be no longer appropriate. However, we will make this clear within supporting procedures.

2.25 BMCM suggested that the use of withheld revenue to pay any fine sanction imposed by a CAT, as opposed to use to provide consumer refunds, might be unlawful. We are not aware of anything within insolvency laws which prevents the imposition of interim measures such as revenue withholds. However, we recognise that in the event of a PRS provider going into liquidation PhonepayPlus would give due consideration to the law when applying paragraphs 4.8.6, 4.9 and 4.11. Paragraph 4.8.6(c) of the proposed 14th Code upon which we consulted further demonstrates how we will take account of the law.

2.26 We would also highlight that where a refund sanction is imposed, paragraph 4.9 of the Code makes clear that where funds have been retained on PhonepayPlus' direction and the provider cannot otherwise satisfy the sanction then refunds to consumers are a priority over fines. In addition, we consider that ensuring the payment of fines is also in the consumer interest as it forms a key part of our overall efforts to drive up compliance in the market and deter non-compliance. We therefore do not propose to alter the current use of withheld revenue to satisfy any sanction – whether refunds or fines – imposed by a CAT.

2.27 IMI Mobile requested that we codify that PhonepayPlus will detail the efforts made to contact a provider, and to seek any representation from them prior to the CAT hearing, when we seek to impose interim measures without notice.

2.28 We can confirm that such efforts will of course be fully documented in the evidence presented to a Tribunal, both when they consider interim measures and also at any later Tribunal hearing in respect of the same case. We have also clarified at paragraph 4.6.3(a) that a relevant party will be provided "*a reasonable opportunity*" to make representations to PhonepayPlus in relation to proposed interim measures (except in the limited circumstances where notice of such measures may not be given).

2.29 We have also considered AIME's comment that the use of "best endeavours" would carry significant legal and cost implications for PhonepayPlus and have decided to amend all references to "best endeavours" within the 14th Code to state that PhonepayPlus will instead use "reasonable endeavours". This does not impact on PhonepayPlus' duty to notify providers as set out in the Code nor minimise the benefits for the investigative process derived from successful notification and further engagement from the relevant party. To provide clarity, the actual steps PhonepayPlus intends to take that will constitute "reasonable endeavours" in such cases will be set out in the supporting procedures.

Removal of Emergency procedure

2.30 AIME welcomed the removal of a separate Emergency procedure from the Code, but noted that a consideration of a service suspension amounted to the same measure. As such they asked whether our supporting procedures have the flexibility to allow for a suspension only of "new" consumers to a subscription service. The hypothetical example they provided was where an existing subscription service is suspended because of its latest, misleading, promotion. However if existing customers had not been misled, then they could continue to receive their chargeable service.

2.31 Based on our previous experience this is likely to be a relatively rare occurrence, but we think it reasonable that the supporting procedures should allow for it. However in developing supporting procedures accordingly, we will be mindful of the need to be sure that existing subscribers have been fairly and auditably signed up to the service. As such we will also be mindful of the requirement in the Code (paragraph 2.3.3) for providers to be able to provide evidence (which is robust) of consent to charge from the existing subscribers, and of the need for PhonepayPlus to satisfy itself that those subscribers were unaffected by the promotional material or other alleged bad practice in question.

Reviews of Withholds and Suspensions by Code Adjudication Tribunal (CAT)

2.32 AIME asked that we codify that where a case allocated to Track 2 with an associated suspension or withhold is downgraded to a Track 1, or abandoned altogether, that the suspension or withhold will also be automatically ended. Given that the decision to impose such measures would have been taken by a CAT, it would be necessary for a CAT to formally remove the suspension or withhold. This can be accomplished either through an interim consent order (Annex 3 para 4.1), or a relevant party can seek a review of the continuation of the interim measure under paragraph 4.6.6(a). In practice the former approach will be adopted and we would seek to expedite the matter.

2.33 AIME suggested that a smaller provider could be unduly affected by interim measures. In circumstances where a withhold or suspension had been applied, their concern was that a provider might be forced to accept an interim measure, regardless of whether they felt it to be fair and proportionate, because of the potentially high cost of appeal.

2.34 In response we would confirm that any interim suspensions will only apply to the relevant services under investigation, and that following consideration of any representations of the relevant provider, any withhold will be set at a level which is appropriate to the likely need for refunds and the likely size of any later fine based on the available evidence of alleged harm. In addition providers will be able to discuss alternative arrangements, such as the posting of a bond in order to remove interim measures, without recourse to appeal.

2.35 Lastly appeals in respect of interim measures will (subject to the existence of any of circumstances set out at paragraphs 4.6.6(i) and 4.6.6(ii) of the Code) be open to all providers – i.e. there will be no "gatekeeper" at this stage and the appeal will be presented straight to a CAT composed of different members to those who took the initial decision to impose interim measures.

2.36 There will be an opportunity for providers to make oral representations during any such review. However, given that there is no "gatekeeper" for such applications for reviews (and therefore the CAT will consider the application and then undertake a review if a required circumstance is met), we have introduced a new sub-provision which aims to deter any frivolous or vexatious requests for reviews and ensure that such requests are not to clog up Tribunals and thereby negatively impact on other cases that need to be dealt with urgently or otherwise. The provision allows PhonepayPlus to be able to refer cases which it considers to be frivolous or vexatious (after first notifying the provider and receiving any representations) to the Chair of the CAP to determine this specific issue. If the Chair determines that a request is frivolous or vexatious then it will not be permitted to proceed to a Tribunal.

**Warning Notices**

2.37 In response to a clear appetite among industry stakeholders for earlier resolution of Track 2 cases, the consultation set out proposals to provide more opportunities for early settlement. Once the Investigations team has concluded its investigation, it was proposed that they would prepare a "Warning Notice", setting out the alleged breaches, supporting evidence and any proposed sanctions. This would be considered by the internal panel drawn from senior executives and members of the PhonepayPlus Board (see paragraph 2.18 above). Subject to any comments by that panel, the Warning Notice would then be sent to the provider concerned.

2.38 Once the provider received the Warning Notice, they could elect to accept the breaches and sanctions at that stage, which would then be ratified by the CAT without a hearing. If a provider wished instead to accept the breaches and sanctions in part, then this would involve further discussion with the internal panel and any settlement subsequently reached would be subject to CAT consideration and ratification. In either case, the matter would conclude where the acceptance is ratified by the CAT. Alternatively the provider can choose to reject the breaches and sanctions outright. If the provider chooses this option, the case moves to a full consideration by the CAT.

2.39 The consultation set out our view that this proposed approach gives the relevant provider complete clarity as to the case against them and also potential sanctions. This improves on the current content of "breach letters" sent out under the 13th Code, and would allow the provider to make a fully informed decision on whether to accept, challenge, or seek a settlement in respect of each of the alleged breaches and proposed sanctions.

2.40 Changes to the current Track 2 procedure to reflect this approach were set out at paragraphs 4.5.3 to 4.5.6 of the proposed new Code.

**Q5 – Do you agree with our proposal to issue a Warning Notice to providers, setting out both breaches and sanctions in advance of any CAT consideration, in order to allow the potential for the case to be resolved prior to a hearing?**

2.41 Once again, these proposals were not challenged in principle by any of the respondents, and welcomed by some. AIME suggested that there may be potential for providers who receive a Warning Notice to feel pressured into accepting it in order to avoid the costs of Tribunal, but did not seek any specific change to the proposed Code or

supporting procedures to address this concern. We note that this is in any case not the intention behind the Warning Notice. As has been recognised by respondents, the Warning Notice is intended to provide greater transparency by giving providers a full and clear statement of the case that PhonepayPlus intends to put to a Tribunal. While this does also offer an enhanced opportunity for the provider to make a decision as to whether to seek to settle with PhonepayPlus before a Tribunal or not, there is no coercive element –further breaches and/or sanctions will not be added to the Warning Notice simply because a provider does not agree with the terms of the Notice. We also note that in accordance with paragraph 4.5.6 of the proposed 14th Code upon which we consulted, any representations of the relevant party will be put before the Tribunal.

2.42 AIME also expressed a concern relating to evidential standards and scrutiny, which – if not met – may lead to case submissions having an unfair impact upon Tribunal assessments of consumer harm and breach severity. The example given suggested that complaint statistics could exacerbate a Tribunal's perception of any issue in relation to an investigation. In their view the specifics of any given complaint about a service need to be checked, to ensure that the complaint actually relates to the alleged breach being adjudicated upon. In addition they suggested that complaint statistics should be balanced against transaction volumes and benchmarked against similar statistics for compliant services. Lastly their expectation was that a complaint narrative which has been refuted by robustly verifiable logs, indicating consumer consent to a charge, should be discarded.

2.43 We would agree that the investigative process needs to continue to achieve the necessary evidential standards to make sure that sound submissions are presented to the Tribunal for consideration. For example, complaints should be properly checked to ensure they relate to the breach or breaches in question. In the example given within AIME's response, we would agree that where complaints are refuted by robustly verifiable logs of consumer consent, this fact should be properly addressed during the investigatory process.

2.44 We understand that complaints may be a small proportion of overall transaction volumes for any given service and recognise the need to ensure complaints are properly checked in relation to any investigation. However, as we have stressed frequently in recent discussions with industry, including at the seminar held in December to discuss the draft Code, a small number of complaints or even a single complaint may be sufficient to demonstrate a serious breach of the Code of Practice, while conversely a higher number of complaints and contacts from consumers may not be sufficient to demonstrate a breach at all. Historically some of our investigations arising from a proportionately small number of complaints revealed more widespread harm of which many consumers of the service remained unaware. The new process also continues to give providers opportunities to respond to the presentation of complaint statistics, including in response to the Warning Notice, prior to a case coming before a Tribunal.

2.45 As a further consideration, we work closely with industry to address identified market trends or issues which may result in whole or in part from consumer misunderstanding. This is with a view to resolving problems without recourse to investigation wherever possible, and should serve as a further filter of consumer complaints.

2.46 BMCM asked if the CAT would explain how the proposed level of fine it had imposed as a sanction was determined. We can confirm that the level of fines will be determined according to criteria set out in the draft supporting procedures[5], and we would expect that the CAT's consideration of these will be referenced in their final decision. BMCM also asked what the process was to agree the wording attached to a sanction. In cases where

[5] This is true under the 13th Code with determinations made in accordance with criteria set out in the *Investigations and Sanctions Procedure*.

settlements are agreed following a Warning Notice then the details would be agreed with a provider before publication. Where sanctions are issued as the result of a CAT decision then the wording of such decision will remain in its control but the provider will be given sight of it prior to publication such that any non-substantive mistakes or errors can be corrected.

2.47 IMI Mobile asked if PhonepayPlus would make any service remedies agreed between PhonepayPlus and providers at Warning Notice stage generally available to the industry. Whilst they recognised that perhaps the detail of individual settlements would be difficult to release, they stressed the same visibility as to current regulatory thinking could be supplied in regular Compliance Updates about service types where settlement has taken place. We agree with the need to update the rest of the industry about regulatory expectations which arise from adjudications (which will include the settlement of Warning Notices), and as such we have a codified duty to publish all our adjudications. We therefore propose to publish the detail of settlements concluded after a Warning Notice is issued (the factual details being agreed with the relevant provider), in a similar way to how we currently publish consent orders agreed through the Oral Hearing process.

**Independent Decision Making Panel**

2.48 In relation to the membership and operation of Tribunals, the consultation set out proposals to establish a new body (the Code Adjudication Panel, or "CAP") from which members of individual decision-making Code Adjudication Tribunals (CATs) will be drawn. The consultation stressed that PhonepayPlus Board members would be excluded from the CAP. However it also stressed that in doing so we would also continue to ensure the CAP retains the right mix of marketing, technical, operational, consumer-focussed and legal and adjudicatory expertise.

2.49 The CAP was codified by changes to various parts of the proposed Code, in particular the start of Part Four, and the newly created sections 4.3.and 4.7, and Annex 3. Changes to section 1.4 of the proposed new Code clarify that Board members will be excluded from the CAP.

2.50 The consultation went on to set out that Board members will continue to be involved at an early stage in the process when interim measures and Warning Notices are considered internally and prior to any CAT hearing. It was our view that continued Board member involvement in the process by way of involvement in the issuing of Warning Notices, including recommendations, provides them with ongoing, practical, experience of the Code and its application during enforcement. It was our further view that this is a benefit to longer-term decision making around the Code and regulatory framework for PRS.

2.51 In addition, the inclusion of non-Executive directors – who will not have been involved in the conduct of the investigation and so will come to the matter afresh – offering senior oversight in the early stages of the investigatory process provides a greater degree of internal scrutiny, and therefore robustness, than if only PhonepayPlus staff are involved.

2.52 Interim measures and the procedures around them were set out at a new section 4.6. of the proposed new Code, and the issuance of a Warning Notice and what it will need to contain was set out at paragraphs 4.5.3 to 4.5.6. In addition, details in relation to the making and formulation of Warning Notices were included in the supporting procedures in order to ensure that this process is fully understood and used effectively by all parties.

**Q6 – Do you agree with our proposal to establish a new independent decision-making panel, from which PhonepayPlus Board Members will be excluded?**

2.53 A number of stakeholders, suggested that PhonepayPlus could codify that all Warning Notices and interim measures will be subject to "*senior oversight*" – or words to that effect – before they are issued by PhonepayPlus to a relevant provider. This would underline a commitment to proportionality and consistency, and further ensure that Warning Notices cannot be issued by just one individual without any form of scrutiny or review.

2.54 We welcome this suggestion, and as such a new paragraph 4.5(b) introduces reference to the involvement of "senior oversight" for interim measures and Warning Notice matters (i.e. in respect of paragraphs 4.5.1, 4.5.3, 4.6.1 and 4.6.2). The exact nature of that senior oversight will be set out in supporting procedures.

2.55 AIME suggested that the Code set out a mechanism by which providers could pass their evidence and information directly to CAT members (i.e. not via the PhonepayPlus Executive). They suggested this would ensure full independence.

2.56 We are unaware of any previous situation where providers have had their evidence or submissions omitted or altered by the Executive. As such we would consider that the cost of establishing an independent secretariat to specifically relay provider submissions to the relevant CAT members would create a disproportionate cost. We can clarify that PhonepayPlus is bound by paragraph 4.5.6 of the Code to pass all evidence and representations supplied by a relevant provider to the CAT.

2.57 Lastly IMI Mobile stressed that CAP recruitment specifications will need to ensure that the CAP retains relevant levels of independence, expertise, and ongoing development of knowledge and understanding in line with market developments. The specification for the Chair of the CAP has already been published as part of our CAP recruitment campaign which will shortly be followed by the publication on our website of the specification for all other CAP positions. This will among other things set out the following expectations:

- Independence, with a track record of impartiality and no conflicts of interest. Bearing in mind that section 121(2) of the Communications Act 2003 carries a requirement for sufficient independence from providers of PRS we have introduced into the Code a requirement for members of the CAP to have no commercial interests in the premium rate sector (Annex 3, paragraph 1.1)
- Ability to understand and weigh up complex (technical) facts and arguments and make a quick and accurate consideration of them

2.58 In addition the specifications will indicate a desire for knowledge and working experience of strategic or product/operations development within PRS or other relevant digital media.

**Post-adjudication Appeals**

2.59 The current set of post-adjudication appeals – namely Reviews, Oral Hearings, and the Independent Appeals Body (IAB) – were a cause of particular concern to stakeholders, as expressed during the development of the 14th Code. They considered them to be overly-complex, time-consuming, costly, and potentially unfair given the first two (Reviews and Oral Hearings) were heard by the same body that heard the original case (albeit in practice each subsequent Tribunal was generally composed of different members).

2.60 In response, and in order to streamline the process generally, we proposed to remove the current post-adjudication Review, Oral hearing, and IAB Appeal Hearing, leaving the CAT hearing and decision as the final stage in our process before a provider can, should they wish to, proceed to a judicial review.

2.61 Whilst providers had continued to request post-adjudication Reviews, in recent years they had been perceived as increasingly redundant by providers who have gone through the investigations and adjudication process. In proposing to remove Oral hearings post-adjudication, we had retained the recognised benefit within the 14th Code of allowing providers an oral hearing in all cases where a Warning Notice has been issued, and introduced an earlier settlement opportunity via a Warning Notice. This meant providers could give a fuller presentation and assessment of the facts and matters of a case than at a paper-based Tribunal if they so wished, or reach a settlement prior to the Tribunal rather than having to resort to either a paper-based or an Oral hearing.

2.62 Lastly in proposing to remove the IAB we considered that an opportunity for internal appeal may, in a limited and low number of cases, offer a cost effective opportunity to challenge the process which preceded it. However we balanced this against the fact that in practice the IAB route has rarely been used, with none since 2011, and that other proposed changes provided more robustness and opportunity for settlement earlier in the process and so made an IAB hearing even less likely. As such it was our view that the IAB would, if retained, add an unnecessary layer of complexity and increase time and cost to both parties which would outweigh any perceived benefits.

**Q7 – Do you agree with our proposal to remove post-adjudication reviews and Oral Hearings?**

**Q8 – Do you agree with our proposal to remove the current Independent Appeals Body hearing, on the grounds set out above?**

2.63 This was the one area of proposals where a number of respondents, representing a significant group of industry stakeholders, disagreed with the principle. Whilst most respondents welcomed the removal of the previous system of reviews and hearings, AIME, IMI Mobile, BMCM and ITV all questioned whether there should not be a simpler avenue of "internal" post-adjudication appeal once a CAT had reached its decision.

2.64 The majority of respondents accepted that the overall investigation and adjudication processes were more robust, and would reduce the chance of the Tribunal making a mistake. However in the event of a mistake of law or fact by a CAT, various respondents expressed the view that most PRS providers are of a small size, and the cost of a judicial review could be expensive enough to dissuade them from seeking a remedy in respect of that mistake. They requested that PhonepayPlus add a single stage of appeal to the model originally proposed.

2.65 The arguments here are finely balanced. On the one hand we proposed a process that was more streamlined, but with robust procedures and oversight in the process leading up to a Tribunal sufficient to mean that a further stage prior to Judicial Review was not necessary to ensure a fair outcome. In addition, we expected that the streamlined process would be more cost-effective in an environment where many of the respondents to this consultation are separately pressing PhonepayPlus to reduce overall costs. On the other hand we have always recognised the fact that some smaller providers in the PRS industry might consider the financial costs and other resources required to mount a Judicial Review as being beyond them. We also consider that it is desirable that we should make clear how we would handle material errors of fact or law, even though we consider them to be highly unlikely to occur in practice. We therefore consider that it is proportionate to provide a mechanism for limited review of a CAT decision.

2.66 To this end, we have added a Section 4.10 to the 14th Code (with consequent additions at Annex 3) to set out such a post-adjudication review. The grounds for a relevant

party to apply for a review of a decision will be limited to manifest and material errors of fact, errors of law, decisions meeting the *Wednesbury* unreasonableness test[6], or decisions reached following a failure to observe decision making procedures set out in the Code and/or supporting Procedures.

2.67 In contrast to requests for reviews of interim measures, which will normally pass straight to a CAT to be considered, a request for a post-adjudication review will first be considered by the Chair of the CAP (or other legally qualified member if they were involved with the original case or are unavailable) for a decision on whether or not a review hearing should be granted. Where a review is granted the Chair of the Tribunal will consider any applications for the review to be (or may decide it should be) dealt with through an oral hearing. As before, PhonepayPlus is obliged to pass any evidence or other representation made by the provider directly to the person making the decision (that is without any omission or alteration).

2.68 If the request for a review hearing is granted, then it will be heard by a Tribunal of three members drawn from the members of the CAP who have had no involvement in the original Tribunal. It is important to note that material associated with an investigation is only passed to the members of the CAT making the adjudication, and not all CAP members.

2.69 As a result of these changes PhonepayPlus has considered the need to establish suitable resources for case management and the fair disposal of cases. This includes having an appropriate number of CAP members to consider and make decisions on interim measures, substantive cases and reviews. While the likelihood of needing more people is low, we do consider the need for greater flexibility in the Code to respond to unforeseen circumstances. To this end, we have amended paragraph 1.1(b) of Annex 3 to the Code, to allow for "*up to three but no less than two legally qualified members*" to be appointed to the CAP, in addition to the Chair of the CAP.

2.70 We intend to appoint only two legally qualified members alongside the Chair of CAP at the time of launching the 14th Code; however, this change will enable PhonepayPlus to appoint a further person where the need arises. In addition to the change at paragraph 1.1(b) we have also amended paragraphs 1.1 and 1.1(c) to clarify the minimum numbers (for the CAP members as a whole and lay members respectively) we believe will be necessary to meet the requirements of the Code in relation to the consideration of reviews by differently constituted Tribunals.

**Commencement and Transitional Arrangements**

2.71 Whenever PhonepayPlus introduces a new edition of the Code it is necessary to set out the date on which the new Code will commence. It is also necessary to set out what transitional arrangements will exist where an investigation commences whilst an old Code is in force, and does not finish until after the new Code has superseded the old one.

2.72 The proposed paragraphs 1.8.1 and 1.8.2 of the 14th Code set out a commencement date, and that from the commencement date the new Code and associated procedures would automatically apply to all existing complaints and investigations. This would include all breaches raised under the 13th Code. In practice this would mean that any complaints or monitoring which was being considered before the date that the proposed new Code took effect would be, from that date, dealt with using the processes of the new Code. In the same

[6] See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680. This case set the test for the judicial review ground of unreasonableness as being that "the reasoning or decision is so unreasonable that no reasonable authority could ever have come to it".

way any investigations which were already underway or breaches raised at the time the new Code took effect would, from that point onwards, be dealt with using the new Code processes.

2.73 In proposing this, the consultation set out the view that the processes in the proposed new Code provide greater benefit to providers than the 13th Code in terms of fairness and simplicity, and that the investigations and adjudication process would be simpler, more streamlined, more robust, provide effective opportunities for oral representations and full hearings, provides earlier and more informed opportunities for settlement (at both the interim measures and substantive consideration stages) and has a greater separation between those involved in the investigation and/or policy and the decision makers .

2.74 We believed that these benefits significantly outweighed any perceived disadvantage to a provider under investigation that could be occasioned by not using the procedures of the 13th edition to investigate or adjudicate on breaches of the 13th Code. In arriving at this conclusion we also took into account the fact that the sanctions available to the CAT under the proposed new Code are identical to those available under the 13th Code.

**Q9 – Do you agree with our proposal to set out transitional arrangements that allow the new Code procedures to apply from the commencement date to all investigations, and/or complaints or monitoring which commenced under the 13th Code?**

2.75 AIME suggested that the Code could be altered in respect of transition to give providers a choice between Code 13 and 14.

2.76 Whilst we understand this view, the goal of the 14th Code was to create more robust and proportionate investigation procedures, and this will necessarily change some of the processes and panels involved. As such any retention of the 13th Code beyond the commencement date would not only be both less robust and proportionate, but also create additional cost given the need to retain the previous architecture. An example of this would be the need to retain the members of the current Code Compliance Panel and Independent Appeals Body on retainer until such time as all 13th Code related cases had been progressed.

2.77 BMCM asked how the transitional arrangements would work in practice. Where cases have been opened under the 13th Code, providers would receive formal notification that the case would be dealt with procedurally under the 14th Code. This will ensure providers are not only aware, but that they can follow the correct process. It should be borne in mind that the transitional arrangements only relate to the procedures by which a case will be investigated and adjudicated. This means that breaches of the Code will continue to be raised under the provisions of the Code that applied at the time the breaches occurred.

2.78 Separately, in relation to our consideration at paragraph 2.74 above (that the sanctions provisions of both the 13th and 14th Codes are identical) we have considered AIME's suggestion to amend the Code such that PhonepayPlus can approve third parties who are capable of providing post-adjudication compliance advice in accordance with any Tribunal sanction. Whilst we do consider that the satisfactory implementation of a compliance advice sanction is of primary importance we are mindful that the quality of such advice must be sufficient to address the issues considered by the Tribunal. We have therefore decided to amend the Code (at paragraph 4.8.3(c)) to allow for the provision of compliance advice by a third party.

2.79 However, this carries the requirement that PhonepayPlus must be satisfied that the compliance advice provided is sufficient to address the breaches of the Code identified by the Tribunal. In practice, prior to any consideration of a potential further breach of the Code

(for non-compliance with a sanction) under paragraph 4.8.6(b) in relation to the quality of advice provided, PhonepayPlus will be able to raise any concerns around this with the provider so that it can be resolved before any need arises to place the matter before a Tribunal.

**Impact and Costs**

2.80 Lastly, the consultation set out an assessment of the impact and costs of the proposals. We expect some of the main benefits of the new model to be as follows:

- Greater transparency and certainty at an earlier stage for providers subject to the Track 2 process provided by the Warning Notice;
- Enhanced opportunity for providers to settle a Track 2 investigation by agreement;
- Fewer cases overall going forward to a Tribunal hearing as we expect at least some cases will be settled following the issue of a Warning Notice;
- Reduction in the number of steps in the process should lead to an overall reduction in the time it takes to go through the full PhonepayPlus process.
- The possibility in a small number of Track 2 cases, of interim measures being implemented earlier in the process than is currently the case, raises a greater possibility of ensuring that there are funds available for consumer redress where a Tribunal determines a breach.

2.81 Given that the new model had not been tested, it was difficult for the consultation to provide anything more than speculative quantitative estimates of costs and savings associated with the benefits outlined above, as at that point we were unable to estimate the proportion of cases which are likely to go through the Track 2 procedure under the 14th Code and what proportion of those cases would go forward to a CAT hearing. These challenges aside, we did present analysis of recent case data to inform respondents' thinking.

**Q10: Do you agree with our assessment of the potential impacts both on PhonepayPlus and providers? Do you have any further information or evidence which would inform our views?**

2.82 Only three respondents directly addressed this question, and none challenged the assessment. Buongiorno acknowledged that there may be additional administrative costs as outlined by the consultation in relation to the introduction of Warning Notices, but expressed the view that the opportunity this afforded for earlier settlement would lead to savings for providers in the longer run.

## Section Three – Next Steps

3.1 Ofcom will shortly issue their consultation document to approve the 14th Code which is attached at Annex B to this Statement. At the same time, it will notify the European Commission of its provisional decision to approve the draft Code. This will begin a statutory three month standstill period under the EU Technical Standards Directive[7].

3.2 If there is no feedback to the Ofcom consultation which suggests they cannot approve it when assessed against the relevant tests set out at s121 of the Communications Act 2003, and there is no objection raised to the Code during the EU standstill period, then we aim to publish the new Code in July 2016, when it will also take effect at the same time.

3.3 We will also alter supporting procedures based on the determinations we have outlined in this Statement. A new version of the draft supporting procedures will be published at the same time as Ofcom consults on approval of the Code. The final version of supporting procedures will be launched in June 2016, in order that stakeholders have sight of it ahead of the date when the Code takes effect.

[7] Directive 2015/1535/EU

## Annex A: AIME comments and suggestions in relation to Specific Code Paragraphs and PhonepayPlus responses

AIME objected to the proposal that the new body should be called the "PhonepayPlus Code Adjudication Panel" arguing that this could give the appearance of less independence from the Board. The intention of the proposed name was to distinguish this body and the Tribunal from others with similar names, but in view of the fact that PhonepayPlus is considering a name change and the draft Code in any case referred to the "Code Adjudication Panel" and "Code Adjudication Tribunal", we have adopted that nomenclature throughout.

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| | No Changes to the Code or Supporting Procedures made in response |
| | Changes to Supporting Procedures made in response |
| | Changes to the Code made in response |

| | Code paragraph | Point/Question | Suggestion for changes to Code/Supporting Procedures/Enforcement Practice? | PPP Response |
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| 1 | 4.1.1 | The end of the sentence, which reads "*complaint is made within a reasonable time from when it arose*" should be rethought in light of a move away from purely complaint-driven regulation. | Code | The organisation is not purely complaint driven. But our remit requires us to consider complaints in a reasonable time, and that is reflected in the wording at para 4.1.1. |
| 2 | 4.3.5 (b) | This paragraph should define "*adequate time*" by number of days, just as paras 4.4.4. and 4.5.4 do for deadlines on the provider. | Code | In keeping with outcomes-based regulation, *adequate time* may vary by provider and by circumstance. As such we think it may create further problems if the Executive rushes to meet a specific deadline.<br><br>*Adequate time* will always be what is reasonable given the individual circumstances of the case. |
| 3 | 4.4.5 (a) | The final part of this para should also include a reference to para 4.4.4. | Code | We agree. Code changed accordingly. |
| 4 | 4.5.1 (a) | Add "*or other agreed corrective action*" to current wording. Otherwise the para assumes that the only resolution to a consumer issue of this scale would be service suspension. | Code | We agree. Code changed to add the recommended wording. |
| 5 | 4.5.5 | Would like to see a provider able to | Code and Enforcement Practice | The request of an extension is already |

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| | | request an extension to the set response time in exceptional circumstances, where it reasonable to do so. | | allowed for at para 4.5.4, and this can also be made clear in the Supporting Procedures by the addition of criteria around granting such an extension. |
| 6 | 4.5.6 | Would like to see the wording altered so that only the three members of the CAP that make up the Tribunal will see the report. If all CAP members were to see it, AIME's view is it would prejudice any future review. | Code | It has always been the intention that only the CAP members that make up a Tribunal will see the report. This is confirmed in the Supporting Procedures as currently drafted.<br><br>However to make this clearer in the Code, relevant references to "CAP" have been changed to "Tribunal" instead. |
| 7 | 4.6.2 | Would like to see "*all*" removed from "*part or all*". This is on the grounds that suspension of all services that a provider runs can have a greater impact than a Tribunal realises. | Code | This wording is not new, and was originally introduced to allow more flexible service suspensions than previously. It is also worth noting that in any investigation, only services in question would be considered for suspension or other interim measure.<br><br>As such if all a providers' services were under investigation then it would still be possible that there is a need to suspend all of them. |
| 8 | 4.6.3 (a) | Would like to see the measures involved in "*best endeavours*" properly defined. | Supporting Procedures | We have changed "*best endeavours*" to "*reasonable endeavours*" within the Code (as stated in 2.28 above), but then defined what that means within Supporting Procedures as suggested. |
| 9 | 4.6.3 (a) | No codified explanation that | Code and Supporting Procedures | The Code already makes clear at Para 4.6.3(c) that |

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| | | where representations are received, then they will be presented to the Tribunal. | | representations of the provider will be notified to the Tribunal. Also, such an explanation is already detailed within supporting procedures. |
| 10 | 4.6.3 (b) | Change wording so "*reasonable timeframe*" sets out a defined minimum period to provide surety.<br><br>Alternatively do not set any defined times, either for providers or PhonepayPlus, out in the Code and instead set them all out in Supporting Procedures. | Code and Supporting Procedures | We have changed the Code at paragraph 4.6.3(a) to ensure a reasonable opportunity is provided. However, we will consider whether supporting procedures could specify a minimum period and reflect any change within those procedures.<br><br>However in general the time period set has to take account of the seriousness of a case. |
| 11 | 4.6.3 (c) | Do not believe that this ensures the provider's representations will pass to the Tribunal with complete independence. | Code | The Statement clarifies that in notifying the Tribunal, PhonepayPlus will continue to pass on any provider representation directly and without any material alteration to the content as has always been the case. |
| 12 | 4.6.4 | This para should require PhonepayPlus to detail the efforts they made to notify a relevant party, and to explain why it was not possible to do so if they have been unable. | Code and Enforcement Practice | These efforts will be fully documented in the evidence presented to a Tribunal. Where a provider has not responded, a Tribunal will need to be satisfied that these matters have been properly addressed before authorising interim measures. |
| 13 | 4.6.5 | As with 4.6.3 (c) above (#11), would like to see a reference to the relevant party's representations being presented to the Tribunal members directly without alteration.<br><br>AIME suggest that ideally the provider or | Code | See response to point 11 above. |

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| | | a legal representative would be present when the representations are passed. | | |
| 14 | 4.6.5 (a) | Question as to whether the sentence needs an additional "*and/or*". | Code | We agree. We do not intend that there should be a withhold in all cases.<br><br>We have changed the Code to make this point clearer. |
| 15 | 4.6.5 (c) | As a knock-on from AIME's comments on para 4.5.1(a) - #4 above – this para would also need changing to reflect that there may be other actions than service suspension. | Code | We agree. We have changed the Code wording accordingly. |
| 16 | 4.6.6 | Concerned that the current wording is a barrier to requesting a review. The para should clarify that a review may be legitimate where the original decision was wrong, the provider had required further time to disprove the assumption in the original hearing, or the issue causing the interim measures has been resolved. | Code | Where there is new information suggesting a Tribunal decision was wrong or that the issue has been resolved, these are already potential grounds for a review (para 4.6.6(ii).<br><br>In addition we have amended the Code at para 4.6.3a) to give providers a reasonable opportunity to make representations when an Interim Measures Warning Notice is received, and such representations will be considered by a Tribunal prior to any such measures being imposed.<br><br>On balance we do not propose to allow a review purely in circumstances where a provider needed more time to disprove the assumption in the original consideration' as there is clearly a need for PhonepayPlus to be able to respond promptly to serious harm or the risk of frustration of sanctions that |

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| | | | | may be imposed by a Tribunal. Also, where appropriate the 'new information' ground can be used to demonstrate that a material consideration of the Tribunal has changed and therefore the measure is no longer appropriate. |
| 17 | 4.6.6 (a)(ii) | This suggests a review would only be granted in the event of new information coming to light. However it may be that the old information just needs to be presented in a different way to the Tribunal. | Code | We do not consider this to be a valid basis for a review as it runs an obvious risk of multiple Tribunal hearings being convened simply to re-consider information that has previously been considered. As we say in in response to 16 above if there is new information suggesting that a Tribunal was wrong then this will fall under para 4.6.6(ii). |
| 18 | 4.6.6 (b) | Para does not currently detail who will take the decision to permit an urgent review. | Code | There will be no decision-taker other than the CAP members who make up a Tribunal. A request for review will be placed in front of them with supporting evidence, and the initial decision will either be rejected or agreed on each occasion. |
| 19 | 4.6.6 (d) | Consider whether two days is urgent enough, given the nature of digital services and the impact of any interim measures on a provider. | Code and Supporting Procedures | We consider that the current proposal of " a *maximum* of two working days" is proportionate, striking the balance between the needs of the provider and the practicalities of bringing together a Tribunal and allowing them time to review the evidence. The word *'maximum'* means that it is possible for a Tribunal to consider the matter sooner if it is practicable to do so. |
| 20 | 4.7.2 | As at para 4.5.6 (#6 above), AIME suggest that the detailed information of any case must be withheld from the full CAP to ensure any review is heard afresh. | Code | As at #6, only the members of the CAP which make up a Tribunal will see the information in the first instance. |
| 21 | 4.7.4 | Highlights a confusion between a paper- | Code and Supporting Procedures | We agree that this could be unclear. |

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| | | based hearing with oral representation, and a full oral hearing. This would be especially confusing in their view to inexperienced providers.<br><br>Suggest that the Code does not distinguish between these two examples of oral representation, but that they are set out in Supporting Procedures. | | 4.7.4 has been changed to make the position clear. |
| 22 | 4.7.4 (e) | In the event that a Tribunal seeks oral representations from PhonepayPlus to clarify an issue, then the provider should be notified so they can hear what has been said. | Code and Supporting Procedures and Enforcement Practice | The issue in establishing a "right of reply" for providers is how to practically do so. If the provider is also present at PhonepayPlus on the day of the hearing then this is relatively easy, but if the provider is not present on the day when the Tribunal determines that clarification is required, then notifying a provider at that point has the potential to delay hearings, or at least make them more time-consuming and costly.<br><br>We will change Supporting Procedures to make clear that where a provider is not present and cannot be reached on a conference phone, sound recordings would be made of any Tribunal conversations with investigators or any expert. |
| 23 | 4.8.3 (c) | Given there are other companies who provide compliance advice, AIME would expect PhonepayPlus to approve third | Code | The Code has been changed to allow for the provision of compliance advice by a third party. However, it remains the case that PhonepayPlus |

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| | | parties who are capable of providing post-adjudication compliance advice, and the Code to reflect such. | | must satisfy itself that the compliance advice is sufficient to address the breaches of the Code identified by the Tribunal. |
| 24 | 4.8.3 (d) | Believe that exercising of the maximum £250k per breach is excessive, and has led to liquidation in the past where fines are uncollectable and the admin charge is indirectly borne collectively by the industry via the levy.<br><br>Had understood that PhonepayPlus was looking to simplify cases so that only one breach would be raised in respect of the same harm or behaviour, rather than multiple breaches which address the same thing. Believe that retaining the right to impose up to £250k per breach acts against this. | Code | The possibility of imposing fines of up to £250k per breach is provided for in statute rather than in the Code of Practice itself.<br><br>We believe that while the circumstances in which it would be appropriate to impose a fine for multiple breaches at £250k each should be very rare, we believe that this sanction needs to remain available to a Tribunal. In addition, the Code and supporting procedures provide sufficient guidance and safeguards to allow providers to challenge proposed sanctions where they believe them to be disproportionate. |
| 25 | Annex 3, 3.1 (a) | Insert "*or*" at end of sentence for clarity. | Code | We have made a change to this paragraph of the Code to aid clarity. |
| 26 | Annex 3, 3.2 | Drafting mistake, there is no 3.1 (c). | Code | The cross reference has been corrected. |
| 27 | Annex 3, 3.7 (now 3.6) & 3.8 (now 3.7) | Suggest these paras are identical in the point they make, and so should be combined. | Code | These are separate: para 3.6 relates to oral hearing applications made under para 3.1(a) and (b) whilst para 3.7 relates to applications made under para 3.1(c). We have |

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| | | | | amended the Code to clarify this accordingly. |
| 28 | Annex 3, 3.11 (now 3.10) | Suggest that industry will find this statement inflammatory, and whilst they appreciate complications which are inherent, suggest strongly that we consider whether there are circumstances where a provider's costs would be recoverable. | Code and Enforcement Practice | This provision is unchanged from the previous Code.<br><br>We do not believe there is any need to change the existing status quo, which is consistent with regulatory practice elsewhere. Determination of what would constitute costs would carry a potentially large burden and corresponding expense. |
| 29 | Annex 3, 3.13 (now 3.12) | All case-related discussions between Tribunal members, and the Tribunal and other parties, should be recorded and if possible witnessed by the relevant provider or their representatives. | Code and Enforcement Practice | As at #22, we will change Supporting Procedures to make clear that where a provider is not present and cannot be reached on a conference phone, sound recordings would be made of Tribunal conversations with investigators or any other expert.<br><br>Given that courts and tribunals are allowed to retire to reach a verdict, we do not immediately see a reason why the provider, or anyone else, should be witness to the discussions of the Tribunal members amongst themselves. As such we have excluded any reference to Tribunal discussions where no other party is involved. |
| 30 | Annex 3, 3.14 (now 3.13) | Provider should be able to request that their hearing is witnessed by an external party. PhonepayPlus should have no objection to this on the grounds of transparency. | Code and Enforcement Practice | Agree that external parties should be able to witness any hearing, but as at #29 not the subsequent deliberations of a Tribunal.<br><br>We will change the draft Supporting Procedures to clarify this point. |